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July 31, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP707-CR State of Wisconsin v. Robert J. Artis (L.C. # 2010CF260)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Robert Artis appeals a judgment of conviction and an order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).[1] We affirm.

Before trial, Artis moved to dismiss the charges on the ground that his request for a prompt disposition under WIS. STAT. § 971.11, which concerns intrastate detainers, was not

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

honored. The court held an evidentiary hearing, after which it denied the motion, in part based on a finding that Artis never submitted such a request to the prison staff. Artis was convicted after a jury trial. In his postconviction motion he alleged that trial counsel was ineffective by not conducting a proper investigation and presenting additional evidence that would have supported his claim that he submitted a request for prompt disposition. The circuit court denied the postconviction motion without an evidentiary hearing.

On appeal, Artis does not appear to dispute the circuit court's original finding that he did not submit the request. In other words, Artis appears to accept that, based on the evidence before the court at that time, the finding was not clearly erroneous. Therefore, we need not further review the court's pretrial decision. We turn to review of the circuit court's decision on Artis's postconviction motion.

Because the court denied Artis's postconviction motion without an evidentiary hearing, on appeal we consider whether he was entitled to such a hearing because his motion alleged facts which, if true, would entitle him to relief, which is a question of law we review without deference to the circuit court. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

The State accurately notes that Artis does not frame his argument on appeal in terms of ineffective assistance of counsel. However, the legal basis for Artis's postconviction motion was ineffective assistance of counsel and his clear intent on appeal is to challenge the analysis the

circuit court used to reject his ineffective assistance claim. The circuit court denied that motion for several reasons. Although the court did not frame its discussion in terms of deficient performance and prejudice, it appears that most or all of its reasons were based on a conclusion that Artis would not have been prejudiced, even if his trial counsel had been able to persuade the court before trial that Artis did submit his request to prison staff. For example, the court concluded that the State's duty to try Artis promptly would still not have been triggered, because that request was never forwarded to the district attorney, as required by WIS. STAT. § 971.11(1).

Artis's arguments on appeal attempt to show why the court erred in that conclusion. Furthermore, because Artis does not challenge the original finding that he made no request, ineffectiveness is the only context in which his arguments can be made. Therefore, we will reframe his argument to fit that context.

However, our focus is on a different point in the court's decision than the one we described above. After setting forth the history of the case up to the time of Artis's first motion to dismiss, the court stated that, given the delay followed by the defendant's "flailing at the system, this court certainly would not have dismissed the case with prejudice," even if Artis's request for prompt disposition under WIS. STAT. § 971.11(1) was held to have been effective and then violated. Referring to dismissal without prejudice, the court asked: "So as a practical matter, where would that get us now, after trial?"

Framed in terms of an ineffectiveness claim, we understand the circuit court to have concluded that Artis failed to allege facts which, if true, would establish that he was prejudiced by counsel's performance. The court was essentially saying that, even if trial counsel had performed better and convinced the court that Artis was entitled to dismissal of the case, the court would have made that dismissal without prejudice, leaving the State free to refile the charges, and Artis not significantly better situated.

Artis addresses this point briefly on appeal. He acknowledges that the circuit court would have had discretion to dismiss with or without prejudice. However, he asserts that whether dismissal would have been with or without prejudice is not before us, and instead we must remand for the circuit court to make that decision. We disagree. The circuit court has already told us what that decision would have been. The question before us is whether to affirm it on appeal. Artis relies on ***State v. Lewis***, 2004 WI App 211, 277 Wis. 2d 446, 690 N.W.2d 668, but that case has little application here because it was not an ineffectiveness claim.

We conclude that Artis's postconviction motion was properly denied because he has not sufficiently alleged that he suffered prejudice from his trial counsel's allegedly deficient performance. The circuit court has stated that its dismissal would have been without prejudice. Artis has not given us any reason to believe that dismissal without prejudice would have been a reversible exercise of discretion, that is, that dismissal *with* prejudice would have been the required result. Nor has Artis given us any reason to believe that a dismissal without prejudice would have ultimately led to a different outcome for him. We have not been given any reason to think that the State would not have refiled the charges; that a different result would have occurred at a different trial; or that Artis would have been given a different sentence after conviction. In short, our confidence in the ultimate outcome has not been undermined.

Most of Artis's appellate brief is devoted to an argument for extending the prisoner "mailbox rule" to intrastate detainers. He presented this argument to the circuit court in the context of ineffective assistance of counsel. As one of his "several specific allegations of ineffective assistance," Artis asserted as part of his fifth ground that trial counsel "did not research, develop or present to the court the important ***Houston*** mailbox rule."

We need not consider the applicability of the mailbox rule in that context because Artis's ineffectiveness claim already fails due to lack of prejudice, as discussed above. The claim still fails on that ground even if the mailbox rule were to be applied to say that Artis submitted an

effective request for prompt disposition. Even if there was an effective request, the resulting dismissal would still have been without prejudice.

To the extent Artis may be attempting to argue the mailbox rule issue in some context *other* than ineffective assistance, that argument must fail because, as noted above, the circuit court found that Artis did not submit any request to prison staff at all. Without a submission to prison staff, there is no submission for the mailbox rule to be applied to, even if we were to agree with Artis that the rule should be extended to intrastate detainers. Only by the use of an ineffective assistance theory can Artis establish that he submitted something to prison staff.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals